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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 1065

CLEMENT J. PRUCHA
AND
THOMAS H. WARD,
*Petitioners,*

v.

HAROLD M. WEISS,
THE DOWNTOWN CIVIC ASSOCIATION, INC.,
A BODY CORPORATE,
NATIONAL PHOTO PRESS, INC.,
A BODY CORPORATE,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray this Honorable Court that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above entitled case on February 6, 1964.

### Opinions Below

The opinion of the Court of Appeals of Maryland is reported in 233 Md. 479 and 197 A. 2d 253 and is printed in Appendix A, *infra*, pages 1a to 6a. The oral opinion of the trial court is unreported but was reproduced in the

printed appendix, which was filed with the Appellants' brief in the Court of Appeals and is being certified to this Court.

## Jurisdiction

The judgment of the Court of Appeals of Maryland was entered on February 6, 1964 and is printed in Appendix A, *infra*. The Petitioners' motion to amend order and mandate of the Court of Appeals of Maryland was filed on February 18, 1964 and denied on March 12, 1964; these are printed in Appendix B, *infra*, pages 6a to 7a.

The jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3), since the Petitioners expressly asserted below and are urging here a deprivation of rights and privileges secured by the Fourteenth Amendment to the Constitution of the United States.

## Questions Presented

Were the Petitioners, as candidates for public office, denied their constitutional rights to due process and equal protection of the laws (under the Fourteenth Amendment to the Constitution of the United States) by the State of Maryland, through the act of its Courts, in failing and refusing to grant limited and temporary injunctive restraint against the Respondents to prevent them from continuing to publish knowingly false statements concerning the Petitioners with the intention of causing the Petitioners defeat at an imminent public election by fraudulently and deliberately deceiving the electorate on the eve of decision?

## Constitutional and Statutory Provisions Involved

The pertinent provisions of section 1, Fourteenth Amendment to the Constitution of the United States (U.S.C. page 288); sections 1, 18A, 29, 39 of Article IV, Constitution of

Maryland (9A Annotated Code of Maryland, 1957 edition); and Rules BB 71, BF 40, BF 43 and 515, Maryland Rules of Procedure (9B Annotated Code of Maryland, 1957 edition) are printed in Appendix C, *infra*, pages 7a to 9a.

## Statement

This is a petition seeking review of the final judgment of the highest state court denying *any* relief against the Respondents for deliberately publishing false statements on the eve of an election for the sole purpose of causing the defeat at the polls of your Petitioners who were seeking public office.

The Court of Appeals affirmed a judgment for costs against your Petitioners which had been entered after a demurrer was sustained, without leave to amend, by the Circuit Court of Baltimore City. The Court of Appeals refused to remand for further proceedings. Appendix B, *infra*.

The Petitioners (Clement J. Prucha and Thomas H. Ward) filed a Bill in equity against the Respondents (Harold M. Weiss, the Downtown Civic Association, Inc., and National Photo Press, Inc.) seeking injunctive relief and damages for past and threatened false and malicious pre-election statements published and to be published by the Respondents against the Petitioners. Each of the Respondents demurred and the chancellor sustained the demurrers on the ground that the court lacked jurisdiction. The appeal to Court of Appeals was from the judgment for costs entered on the orders sustaining the demurrers.

The Petitioners were seeking nomination by the Democratic Party in the municipal primary election, to be held in Baltimore City on March 5, 1963, for seats in the City Council allocated to the Second Legislative and Council-

manic District. Their candidacies were endorsed by an established political faction known as the Regular Second District Democratic Organization. Three other candidates for the nomination were endorsed by the Downtown Civic Association (Downtown Association), a political faction organized and controlled by Respondent Weiss. Over a period of years, the Downtown Association had irregularly published a political tabloid known as the "Downtown News" ("News"), delivered primarily within the Second Councilmanic District. There were few editions distributed in small volume between the elections; but immediately preceding a primary, the political tabloid was published every several weeks and in great volume as an instrument of the political campaign (Bill par. 5, reproduced below in the appendix or record extract and now in the certified printed record, pages E. 3-4 — hereinafter referred to as E. 3-4). Commencing in January, 1963 the "News" published articles supporting the candidates endorsed by Weiss for the seats in the City Council. On February 23, 1963, the "News" contained a bold headline stating that "POLLACK SUPPORTS PRUCHA AND WARD" and supporting explanatory articles. In one article, referring to one of the candidates, it was stated that "we will explain in full in a later issue." This edition of the "News" also noted that there would be a "special edition" before the election.

Two days later, the Petitioners filed suit against the Respondents and the candidates they were supporting, praying for compensatory and punitive damages and an *ex parte*, a *pendente lite* and a permanent injunction to restrain the Respondents from further distribution of the falsehoods. The Bill of Complaint was supported by affidavits (E. 11). Attached to the Bill was the proposed *ex parte* injunction which would have required the Re-

spondents to present to the Petitioners, forty-eight hours in advance of distribution, a copy of any newspaper to be published by them prior to March 7, 1963. There were also provisions for dissolution of the *ex parte* injunction upon twenty-four hours notice and for automatic termination on March 7th. The chancellor declined to sign the *ex parte* injunction but did sign a show cause order which was promptly served on the Respondents. Although the demurrers were filed promptly, they were not heard and disposed of until after the election.

On appeal the Petitioners contended that they were denied their constitutional right to due process and equal protection of the law by the State of Maryland (through the act of one of its courts) in refusing to grant a limited and temporary *ex parte* injunction to restrict and restrain the publication of anticipated untruthful statements concerning the Petitioners and that a court of equity has the power to issue an injunction to restrain the publication of libelous statements.

The constitutionality was raised as the principal question in the appellate court (Appendix D, *infra*, page 9a). The Court of Appeals avoided the question. Appendix A, *infra*, page 6a.

**Argument**

The Petitioners, as candidates, were entitled to have their candidacies for public office protected from deliberately untruthful statements. When the Circuit Court of Baltimore City failed and refused to restrain the publication of untruthful statements, intended to cause the defeat of the Petitioners as candidates, the Petitioners were denied a fundamental constitutional right to a fair and free election. The refusal of the Circuit Court was a denial of

due process and equal protection of the laws. The Circuit Court is an agency and instrumentality of the State of Maryland. *Shelley v. Kraemer*, 334 U.S. 1, 14, 20.

I.

All phases of elections are subject to the protection of the Constitution of the United States. *Gray v. Sanders*, 372 U.S. 368; *Baker v. Carr*, 369 U.S. 186; and *Terry v. Adams*, 345 U.S. 461, 477. A candidate is entitled to the protection of the state as against untruthful statements which are knowingly made with the deliberate purpose of injuring the victim. *New York Times Co. v. Sullivan*, 11 L. Ed. 2d 686, 706. There is no problem of fair comment or erroneous misstatement here, since the Petitioners have expressly alleged in their original Bill of Complaint that the Respondents knew that their statements were untrue in fact. Intentional falsehood is not within the protection of the First Amendment. *New York Times Co. v. Sullivan*, 11 L. Ed. 2d 686, 706; *Roth v. U.S.*, 354 U.S. 476, 483; and *Beauharnais v. Illinois*, 343 U.S. 250, 266.

Where a citizen criticizes a public official he has a conditional privilege from suit similar to the conditional privilege that most public officials have as against the private individual. *New York Times Co. v. Sullivan*, 11 L. Ed. 2d 686, 708. But criticism of the public official is substantially different than the intentional political lie made on the eve of an election as against a candidate. In the latter case the lie can poison the mind of the electorate at the critical moment and the damage, not only to the candidate but to the effectiveness of democracy, is irreparable. Money damages are no solace, even if they can be obtained. Compare the defeat of a Nevada Supreme Court judge in *Southwestern Publishing Co. v. Horsey*, 230 Fed. 2d 319.

The constitutional guarantee of a free and fair election is equally important as the constitutional guarantee of freedom of speech and freedom of press if democracy is to survive. The only purpose of guaranteeing freedom of speech and freedom of press is to permit the free interchange of ideas, opinions and points of view with the expectation that the best will ultimately prevail, but to enshrine the concept of freedom of speech and press to the point where its abuses are condoned and encouraged is to endanger the very democracy which these freedoms were intended to strengthen. When time is not of the essence, the accidental misstatement and perhaps the intentional lie can be balanced by the vigorous presentation of the truth. On the eve of an election there is no such safeguard. Time favors the liar. The intentional and calculated lie is capable of doing irreparable damage. As a subversive would change the government by force and violence, the propagandist can change the government by fraud. In every totalitarian state the military suppression of opposition receives no greater attention than the role of the propagandist. Both must subvert, in his own way, the will of the people. For the courts to refuse to protect the candidate in a democracy from the intentional lie is to deny the candidate his fundamental right to a fair and free election. There is an urgent necessity to judicially balance fundamental constitutional rights: on one hand the right to free speech and press, and on the other hand the right to a fair and free election. The judicial process is capable of meeting the challenge and tailoring the remedy.

The problem of prior restraint has been a haunting specter where freedom of speech or press is involved. This Court has clearly established that it is unconstitutional to have a blanket future restraint of any statement either

as to person or subject matter. *Near v. Minnesota*, 283 U.S. 697. When it is determined that a type of speech or publication, such as obscenity or libel, is not within the protection of the First Amendment, then a limited restraint is permissible. The restraint can only effect the distribution or publication of material *after* composition. After composition even *ex parte, pendente lite* injunctions may issue pending a hearing on the merits. *Kingsley Books v. Brown*, 354 U.S. 436, 440, 444. There must be a careful weighing of the respective public interests involved and the probabilities of irreparable damage. 4 *Restatement of Torts*, Section 942.

Here was a clear example where the right to freedom of press was being used as a sword to treacherously attack rather than as a shield. The deliberate lie was intended to cause a wrongful defeat in a public election. A prompt injunction would mitigate the initial wrong and prevent its further spread. The partial restraint on future publication and distribution was not a technical *prior restraint* in that the restraint only applied to material after its composition and not before. The prayer for the narrowly limited future restraint was not a fishing expedition, general in scope and long in time. It was based on reasonable anticipation and probable cause: Weiss had already deliberately published one lie and was threatening to publish more before the imminent election. There was nothing vague about the problem or anything indefinite as to the relief required. The Court refused its protection and the Petitioners were left either to the mercy of a vicious defamer or to retaliation under the law of the jungle. An election should be conducted on a higher level than a jungle, and the courts should not refuse to exercise their power to insure that the fountainheads of public information are not poisoned on the eve of decision.

This Court can take judicial notice of what happened thereafter from the newspaper accounts.* Compare the

*THE EVENING SUN — March 5, 1963

SAMPLE BALLOT THEFT AT P. O. CHARGED

A 44-year-old man, described as a freight conductor, was arrested at his home early today and charged with the theft Saturday of $1,500 worth of campaign literature from the Post Office.

The literature, in eighteen canvas bags, included sample ballots and campaign tabloids.

The defendant, Courtlandt A. P. Trenor, of the 3100 block East Monument Street pleaded innocent.

*Postponement Granted*

At a hearing before Judge William Hudnet in Central Municipal Court, the defendant said:

"I don't know anything about this case. I only know what I read in the newspapers and I don't always believe everything I read in the newspapers."

Judge Hudnet granted a request by Trenor's lawyer, Alan Murrell, that the case be postponed until Thursday to allow him time to prepare his case.

Trenor was then released under $1,500 bail.

The complainant in the case is Harold M. Weiss, who heads the pro-Mayor Goodman faction which delivered the ballots to the Post Office.

The faction, however, included with the ballots a four-page campaign tabloid alleging Mayor Goodman's support for Second district councilmanic candidates, C. Lyman Schueler, Herbert J. Herman and Camillo N. Antonelli.

*Condemned By Mayor*

The Mayor sent telegrams Sunday, condemning the tabloid as "fraudulent."

As a result, the Goodman headquarters told Post Office officials that the candidate's bulk mailing permit could not be used.

Mr. Weiss was told to send to the Post Office to retrieve the ballots. Someone else, however, arrived at the Post Office first and picked up the literature.

Later, Mr. Weiss and others working for one Democratic faction of the Second councilmanic district, gave police and postal inspectors a description of the man they suspected had taken the ballots.

Today's arrest came after a conference by postal inspectors, city police, Mr. Weiss and fellow political workers.

The Post Office decided that since the mailing was not paid for, it could not be considered "mail." The decision thus ruled out the possibility of Federal mail-theft charges being brought against the defendant.

Trenor was arrested at his home at 5:30 A.M. today by Lt. James T. Middleton and Sgt. Frank Snyder, both of the Central district.

Court's action in *Gray v. Sanders*, 372 U.S. 368, 389 and 203 F.S. 158, 160 (footnote). After the suit was filed and the trial court refused to restrain in any manner the respondents, Weiss and others published another political tabloid which they attempted to deposit in the mails for distribution to all the Democratic voters in the District. This second political tabloid was labelled as "fraudulent" in the public press by the Mayor of Baltimore. Before the second tabloid could be processed over a dozen containers disappeared from the post office. Weiss appeared as a prosecuting witness at a preliminary hearing which resulted in the indictment of an individual accused of stealing Weiss' fraudulent political tabloid. This is the dramatic example of the result of the trial court's refusal to restrain Weiss as prayed.

The candidate's interest is coupled with the public interest. If elections are to be not only fair and free, but also orderly, it is essential that deliberate frauds against both the public and the candidate be the subject of orderly restraint rather than the basis for compounding the problem by retaliation and violence. There is an overriding public interest and the refusal of the judiciary to act inflicts irreparable injury to a vital civil right and an essential democratic process. Any question involving the maintenance of fair elective process and requiring injunctive relief is within the power of an equity court and the failure of an equity court to act when requested is a denial of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment.

II.

The Petitioners have faced a labyrinth of legal fictions, legal taboos and judicial indifference. There was the fiction that equity lacks "jurisdiction", the taboo that freedom

of the press is the freedom to destroy another with impunity and the indifference to the real, continuing and increasing problem of fairly informing the electorate at the time of democratic decision. The whole nasty problem is given the judicial brush-off: its too political, its too late and try a different forum next time, if you survive. Its enough to discourage even the hardiest soul.

How can such deliberately wrongful conduct undermining the vital democratic process of public election go unrestrained? The ancient Greek gods could not have devised a greater obstacle course than faced the Petitioners.

*First*, it is asserted that, having one's name associated with a notorious character is not a libel. This abstract reasoning ignores the history of our times, with its character assassination and guilt by association. The aftermath of the McCarthy hearings and the defeat of the late U.S. Senator Millard Tydings (by a composite picture of the Senator in a friendly pose with Communist Earl Browder) were apparently beyond judicial notice. Even if a state is free to eliminate civil liability by labelling such frauds non-libelous, a state cannot refuse to act when such fraudulent conduct endangers the elective process. In a democracy, pre-election debate should be "uninhibited, robust, and wide-open" (*New York Times v. Sullivan*, 11 L. Ed 2d 686, 701), but the decisions recorded at the polls should be "changes desired by the people" and be based on "lawful means", not fraud. Compare: *Roth v. United States*, 354 U.S. 476, 484 and *Stromberg v. California*, 283 U.S. 359, 369. Here the Court of Appeals conceded that "such statement might hinder their chances of success" Appendix A, *infra*, page 5a. Whether the intentional and false association of a candidate's name with a person of ill-repute is libel or not in state law, it is an election wrong in a constitutional sense and must be judicially restrained.

Who is Pollack?

There are few men who occupy important executive, legislative or judicial positions in the State of Maryland, particularly in the City of Baltimore, who have not had public or private connections with James H. (Jack) Pollack. For over a quarter of a century Jack Pollack has had a decisive part in making governors and mayors: their appointments were pawns in the game. He notoriously dominated legislative and city council coalitions. At one time or another most men in public life were his acquaintances and many sought and were delighted to receive his aid — preferably privately. What friend or beneficiary could believe that a link with Pollack's name would be libelous?

To the people of Maryland, Pollack epitomizes political corruption. The newspaper attacks upon him established an image that deterred respectable office holders from publicly seeking Pollack support. Pollack's name and reputation have been the subject of widespread adverse public discussion. Pollack's bad reputation was adjudicated a score of years ago in *Owings Mills Distillery v. Helvering* (C.C.A. 4), 124 F. 2d 379, 381, where it is noted that Pollack's name by 1941 had appeared on the Baltimore police blotter 54 times with 16 convictions. Judge Dobie observed that Pollack had attempted to bribe and threaten the federal investigators in the case.

In more recent years Pollack has been involved in much notorious litigation

The newspapers several years ago linked his name with a man convicted of obtaining fraudulent petitions for a referendum. In 1961, he sought to delay a reform of the municipal court system (*Pollack v. Tawes*, Circuit Court of Baltimore City, Docket 101A, Folio 491, Case A41712).

In 1962 he was involved in at least 3 political scandals: Filing as a candidate a person with a name similar to an incumbent (*Abramson v. D'Alesandro;* Circuit Court of Baltimore City, Docket 102A, Folio 173, Case A42534); a grand jury investigation of a charge that Pollack had tape-recorded a "deal" with the incumbent governor who was then seeking re-election without Pollack's support (Bill par. 19, E. 7); a surreptitious state central committee meeting to select a nominee for State's Attorney while the deceased was being buried (*Valle v. Pressman*, 229 Md. 591).

This was the image and the posture of the Pollack name in 1963 when Weiss deliberately printed the lie about the Petitioners — just 10 days before the election.

The impact of the name *Pollack* was the same as a headline that: "The Corrupt Boss supports. . . ." The common inference is that support is secretly bargained for and privately welcomed, regardless of profuse, pious and public disclaimers. Would the local effect be better understood by suggesting an analogous result from perhaps the headline: "Communist Party supports. . . ." Weiss was not wasting campaign funds and time to publicize ineffectual or abstract "information" about the Petitioners. It was Weiss' political judgment that the false headline would defeat the Petitioners. It is sophistry to now try to argue the opposite. The Respondent successfully avoided having his deposition taken (E. 16) and he never answered the merits under oath. The Respondents' demurrer admits the truth of the Petitioners' allegations: all of which were supported by affidavit. The burden of proof is on the Petitioners, but they have been denied any and every opportunity to meet it.

It is a curious sidelight that the Court of Appeals found detailed allegations not only failed to establish libel *per se*,

but could not even amount to libel *per quod*. It ignored the Maryland doctrine that the actual effect of words may be established by proof of peculiar or local significance. *DeWitt v. Scarlett*, 113 Md. 47, 53, 56. The Court of Appeals refused to allow any amendment to satisfy any deficiency and would not permit even a transfer to law on remand. This flies in the face of precedent and negates its own rules. Compare, *NAACP v. Alabama*, 357 U.S. 449, 454-458. The Petitioners have been denied any remedy in Maryland. Appendix B, *infra*.

*Second*, the Court of Appeals held that equity has no "jurisdiction" to enjoin any libel. This is in line with most older American decisions. 47 A.L.R. 2d 715. The *Restatement of Torts* (Section 942). Dean Roscoe Pound (29 Harvard Law Review 640), and some modern decisions (*Krebiozen Research Foundation v. Beacon Press*, Mass. 1956, 134 N.E. 2d 1, 6; *Nann v. Raimist*, N.Y. 1931, 174 N.E. 690, 694; *Westwillow Realty Corp. v. Taylor*, 198 N.Y.S. 2d 196, 199 and *Wolf v. Gold*, 193 N.Y.S. 2d 36, 38) are *contra*! The earlier American decisions were based on the dictum of Lord Chancellor Eldon in *Gee v. Pritchard* (1818), 36 E.R. 670, but sixty years later the English courts in effect reversed their position and libels can be enjoined now. The British have developed a procedural safeguard in considering *pendente lite* injunctions. If the defendant denies or asserts a valid factual defense *under oath*, no injunction will issue *pendente lite*. *Bonnard v. Perryman*, 65 L.T.R. 506. Thus the defendant is free if the matter is substantially true or a fair comment; the plaintiff has the protection afforded by the perjury laws. The public benefits from the *disinfecting sun light* of the issue-developing pleadings. One English case, which is almost on all fours with this litigation, is *Burns and Others v.*

*Associated Newspapers Limited* (1925), 42 Times L.R. 37. In that case, the complainants sought to have the newspapers enjoined from saying that they were Communists ten days before a municipal election. The candidate sought a *pendente lite* injunction. The hearing on the preliminary injunction was held two days before the election. The judge found that the statements were not prohibited by the election statute and since the defendants *in their answer* had denied the truth of the allegations that there was an issue of fact to be determined and, therefore, a preliminary injunction would be inappropriate on equitable principles.

The evolution of equity jurisprudence in England and some of the modern American decisions would indicate that there is no substantial basis for asserting that equity lacks the power or jurisdiction to enjoin a libel. It is not a question of power, it is a question of propriety and constitutional restrictions. Maryland recognized this distinction between power and propriety in *Moore v. McAllister*, 216 Md. 497, 507, 509-510 and *Wells v. Price*, 183 Md. 443, 450, 453.

Maryland has held that even strictly *legal* actions are subject to equity intervention where there is a question of irreparable damage. *Leekley v. Dewing*, 217 Md. 54, 58 and *Hanley v. Stulman*, 212 Md. 273, 277. Maryland has also established that an equity court should retain jurisdiction for ancillary relief even where injunctive relief has become moot pending the litigation. *Phillips Co. v. Md. Broadcasting Co.*, 184 Md. 187, 198. Concurrent jurisdiction at law does not oust equity's jurisdiction. *Carter v. The Suburban Water Co.*, 131 Md. 91, 95. A legal remedy has been held inadequate unless it reached the "whole mischief" in a "perfect manner", both at the present and

in the future. *Whitman v. United Surety Co.*, 110 Md. 421, 428. Maryland, by both decision and rule, has long held that a law court in applying equitable relief is limited to the relief which equity itself could grant. *Dundalk Holding Co. v. Easter*, 215 Md. 549, 554, 557; *Turner v. Wash. Sanitary Comm.*, 221 Md. 495, 506 and Maryland Rule BF 43 (Appendix C, *infra*). The Court of Appeals completely ignored these decisions by implying that perhaps the Petitioners would have had better luck if they would have filed their suit at law and sought an injunction as ancillary relief. Appendix A, *infra*, page 4a. All this in the face of the numerous decisions and the current Rule (BF 43) which limit equitable relief at law to all the limitations of such relief in equity. This is legalistic double talk and is the misapplication of state procedure condemned by this Court in *Ward v. Love County*, 253 U.S. 17, 22 and *NAACP v. Alabama*, 357 U.S. 449, 457.

*Third*, the Court of Appeals avoided the constitutional question by asserting that injunctive relief for a past election is a moot question. But the Court of Appeals has long recognized that a question is not *technically* moot either: (1) where the question is of the recurring type which can never receive appellate review in the ordinary course or (2) where there is some other relief or issue depending thereon. In *Tolman Laundry v. Walker*, 171 Md. 7, 15, the Court held that the case was not technically moot and required a decision in order to protect the appellant from liability under a *pendente lite* injunction bond. The liability on the bond alone was sufficient to save the case from mootness. The possibility of recurrence of a similar question has been held sufficient to prevent *technical* mootness in Maryland. *Close v. Southern Md. Agr. Asso.*, 134 Md. 629, 632 and *Sheeny v. Thomas*, 155

Md. 688, 693. This Court recognized that so long as wrongdoers are "free to return to . . . old ways" the problem is not moot. *Gray v. Sanders*, 372 U.S. 368, 376. The Petitioners will never be able to get appellate review of their question in the future, since the Maryland Court of Appeals has applied a different standard of technical mootness to them and has thus denied them due process and equal protection. *NAACP v. Alabama*, 357 U.S. 449, 457.

Maryland has a right to decide what is libel in Maryland, but it cannot decide that it will do nothing to insure a fair and free election as guaranteed by the Fourteenth Amendment. *Terry v. Adams*, 345 U.S. 461, 477. Labels do not control. *NAACP v. Button*, 371 U.S. 415, 429. Nor can a state avoid a duty to act, when it has the power to act, by vaguely suggesting that the relief might have been obtained in a different forum of the state even though it has long recognized that the other forum cannot grant any greater relief. Constitutional rights cannot be so evaded. There may not be two standards for applying the technical doctrine of mootness: constitutional problems are not so easily disposed of. The Petitioners have been denied procedural due process at every judicial echelon in the State of Maryland. The present decision will establish a rule of law in the State that the courts will not intervene to protect a candidate from deliberate falsehoods calculated to defeat him. The Court of Appeals may have stated that it was "unnecessary to consider" the denial of constitutional rights, but in effect the constitutional rights were ignored by the application of novel procedure. Compare, *NAACP v. Alabama*, 357 U.S. 449, 457.

**Conclusion**

The State has a constitutional duty to protect candidates from deliberate and malicious lies calculated and intended to defeat them in an election. Injunctive restraint has been an ancient fountainhead of equitable jurisprudence. Equity had the power to act since the principal relief sought by the Petitioners was injunctive in nature: first, a prohibitive injunction to stop a pre-existing falsehood which was continuing to do irreparable damage to the Petitioners; second, a specialized form of mandatory injunction to intercept a threatened falsehood intended to cause immediate and irreparable damage on the eve of an impending election. No law court's procedure was prepared to tailor this relief against the continuing flow of printed lies by a calculating and vicious defamer who intended thereby to inflict a wrongful defeat at an impending election. A civil right and a democratic process, as well as a personal right, demanded immediate equitable protection.

When equity assumed jurisdiction, it had a duty to continue that jurisdiction to protect the constitutional rights of the Petitioners. The failure of the Court to insure a fair and free election to the Petitioners was the denial of a constitutional right to due process of law and equal protection of the laws under the Fourteenth Amendment. Here the equity court failed to act when it had a duty to act. Under the established Maryland practice, once equity has assumed jurisdiction (whether independent or concurrent), it has a duty to retain jurisdiction, even if the injunctive relief becomes impossible or unnecessary, if only to grant ancillary relief or to establish liability for the costs incident to the suit. Here the Petitioners were summarily dismissed without any opportunity to amend

or to transfer to an appropriate forum, if any there be. The appellate review was equally summary.

The Petitioners should be granted a Writ of Certiorari to establish their constitutional entitlement to protection from deliberate falsehood on the eve of election and to relieve them of the numerous costs to which they have been put in attempting to obtain judicial recognition of this constitutional right to a fair and free election. There is an apparent conflict of constitutional rights. The issue is vital to the democratic process. It deserves a full hearing.

Respectfully submitted,

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Attorney for Petitioners.

# APPENDIX A

## Opinion of Court of Appeals of Maryland

(Filed February 6, 1964)

Clement J. Prucha, et al.

v.

Harold M. Weiss, et al.

Horney, J.

The plaintiffs-appellants (Clement J. Prucha and Thomas H. Ward) filed a bill in equity against the defendants-appellees (Harold M. Weiss, the Downtown Civic Association, Inc., and National Photo Press, Inc.) seeking injunctive relief and damages for alleged past and prospective false and malicious pre-election statements published and to be published by the appellees against the appellants. Each of the appellees demurred and the chancellor sustained the demurrers on the ground that the court lacked jurisdiction. This appeal is from the judgment for costs entered on the orders sustaining the demurrers.

The appellants and another person were seeking nomination by the Democratic Party in the municipal primary election, to be held in Baltimore City on March 5, 1963, for three seats in the City Council allocated to the Second Legislative and Councilmanic District. Their candidacies were endorsed by an established political faction known as the Regular Second District Democratic Organization. Three other candidates for the nomination were endorsed by the Downtown Civic Association (Downtown Association), a political faction organized and controlled by Weiss. Over a period of years, the Downtown Association had irregularly published a political tabloid known as the "Downtown News" ("News"), delivered primarily within the Second Councilmanic District, which in January 1963 commenced publishing articles supporting the candidates endorsed by the Downtown Association for the three seats in the City Council. On February 23, 1963, the "News" contained a headline stating that "POLLACK

SUPPORTS PRUCHA AND WARD" and supporting explanatory articles. In one article, referring to one of the candidates, it was stated that "we will explain in full in a later issue." This edition of the "News" also noted that there would be a "special edition" before the election.

Two days later the appellants filed suit against the appellees and the candidates they were supporting, praying for compensatory and punitive damages and an *ex parte*, a *pendente lite* and a permanent injunction to restrain the appellees from further libel. Attached to the bill was the proposed *ex parte* injunction which would have required the appellees to present to the appellants forty-eight hours in advance of distribution a copy of any newspaper to be published by them prior to March 7, 1963. There were also provisions for dissolution of the *ex parte* injunction upon twenty-four hours notice and for automatic termination on March 7th. The chancellor declined to sign the *ex parte* injunction but did sign a show cause order which was promptly served on the appellees. Although the demurrers were filed promptly, they were not heard and disposed of until after the election.

On appeal the appellants contend that they were denied their constitutional right to due process and equal protection of the law by the State of Maryland through the act of one of its courts in refusing to grant a limited and temporary *ex parte* injunction to restrict and restrain the publication of anticipated untruthful statements concerning the appellants and that a court of equity has the power to issue an injunction to restrain the publication of libelous statements.

In addition to filing a brief, the appellees moved to dismiss the appeal because the questions presented concern the refusal of injunctive relief only, but we deem it proper to decide the appeal on the merits rather than dismiss it.

Inasmuch as the election has long since been held, it is clear that the case is moot on the questions posed by the refusal of the chancellor to issue the *ex parte* injunction. See *Lloyd v. Bd. of Supervisors of Elections*, 206 Md. 36, 111

A. 2d 379 (1954). Cf. *Freedman v. Seidler*, 233 Md. 39, 194 A. 2d 778 (1963); *Tolman Laundry v. Walker*, 171 Md. 7, 187 Atl. 836 (1936). However, since the bill also sought compensatory and punitive damages for the alleged false and malicious statements published in the February 23rd edition of the "News", it is appropriate to decide whether the case should be remanded for a determination of whether there was a libel and if so the amount of damages arising therefrom. Of course, no punitive damages may be awarded by a court of equity. *Superior Construction Co. v. Elmo*, 204 Md. 1, 14, 104 A. 2d 581 (1954).

Ordinarily a person who is aggrieved by an alleged libelous publication will institute an action at law for compensatory damages and, in case there is actual or express malice, for punitive or exemplary damages. Protection against defamation, such as libel, has not been one of the traditional areas of equity jurisdiction. Consequently it is generally held that in the absence of independent grounds of equitable jurisdiction, equity lacks power to issue an injunction restraining the publication of defamatory matter. See 4 *Pomeroy's Equity Jurisprudence*, § 1358 (5th ed.); Newell, *Slander and Libel*, § 265 (3rd ed.). The primary reasons for the reluctance of equity to extend its jurisdiction so as to grant injunctive relief in cases of libel, a personal action, seems to be the traditional limitation of equitable jurisdiction to the protection of property rights, and the fear that to grant such relief would violate the constitutional rights of freedom of speech and press and trial by jury. See the annotation, "Injunction as remedy against defamation of person," 47 A.L.R. 2d 715. Although this Court has not heretofore had to consider the power of equity to enjoin a continuing or threatened libel, we have consistently recognized and enforced the constitutional guarantees of freedom of speech and press and had occasion to say in *Negley v. Farrow*, 60 Md. 158, 176 (1883), that:

> "The liberty of press guaranteed by the Constitution is a right belonging to every one, whether proprietor of of a newspaper or not, to publish whatever he pleases,

without the license, interference or control of the government, being responsible alone for the abuse of the privilege."

We agree with the prevailing concept in other jurisdictions that a person allegedly injured by a libelous publication has no right to seek injunctive relief in equity. He has an adequate remedy at law for damages. Moreover, under the Maryland Rules of Procedure, he may claim an injunction as ancillary relief in an action at law. See Rules BF40-BF43, particularly the latter, wherein it is provided that "the court shall apply the same tests and standards as would be applied in an action in equity."

The appellants further contend that even though libel is a law action, the jurisdiction of equity is not ousted when there exists a ground on which relief in equity may be invoked. The short answer to this contention is that the only relief sought which would appropriately support the jurisdiction of equity was the prayer for the injunction; and, inasmuch as the lower court clearly lacked jurisdiction and power to grant injunctive relief, the bill was in effect an effort to obtain damages for an alleged libel in a court of equity. See *Tidewater Express Lines v. Freight Drivers*, 230 Md. 450, 187 A. 2d 685 (1963). There were no independent grounds of equitable jurisdiction. Cf. *Nagel v. Todd*, 185 Md. 512, 45 A. 2d 326 (1946); *Dorman Corp. v. Doric Co.*, 221 Md. 145, 156 A. 2d 632 (1959). Nor were any property rights involved which would justify a retention of jurisdiction. Cf. *Hanley v. Stulman*, 212 Md. 273, 129 A. 2d 132 (1957); *Leekley v. Dewing*, 217 Md. 54, 141 A. 2d 696 (1958). Moreover, the only relief asked for, aside from the injunctions, was essentially compensation for an alleged personal injury which should have been sought in a court of law by an action of libel for damages, with or without a "claim for injunction."

Even if it is assumed that the lower court has jurisdiction to hear this case on the merits, it would seem that the allegations of the bill are insufficient to support an action of libel. While no definition of the term "libel" is sufficiently

comprehensive to embrace all cases, it has been said that libel "includes any unprivileged * * * false and malicious publication which by printing, writing, signs or pictures tends to expose a person to public scorn, hatred, contempt or ridicule." *Thompson v. Upton*, 218 Md. 433, 437, 146 A. 2d 880, 883 (1958). For a statement to be libelous, it is necessary to show that the words used were not only untrue and injurious, but that they were concerned with and injurious to the character and integrity of the one complaining. *Foley v. Hoffman*, 188 Md. 273, 52 A. 2d 476 (1947). See Newell, *op. cit.*, §§30, 31. It is clear that neither the headline, "POLLACK SUPPORTS PRUCHA AND WARD", nor the supporting and adjoining articles,[1] were libelous *per se* since the words on their face were not defamatory to the appellants. See Prosser, *Law of Torts*, §93 (2nd ed.). The mere fact that it was said that a politician who is the subject of much adverse criticism was endorsing the candidacies of the appellants, even though such statement might hinder their chances of success, does not necessarily convey an imputation detrimentally affecting the personal character and integrity of the appellants. Nor do the so-called *colloquium* and *innuendo*[2] establish libel *per quod* since the extrinsic evidence contained therein is insufficient to create a defamatory meaning which could be imputed to the appellants. Many candidates for public office are openly supported by persons of ill repute whose advocacy of their candidacies often do more harm than good.

With these holdings (a) that the question posed by the non-issuance of the injunction is moot, and (b) that equity

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[1] The supporting article stated that: "In the Second District, Pollack is supporting Clem Prucha and Tom Ward for City Council, and whoever these two take for Mayor."

An adjoining article on the front page stated that Weiss: "Was told by Mr. Pollack in the presence of witnesses that Mr. Pollack was backing Prucha and Ward in the Second District for the City Council and that he intended to spend some money for their campaign."

[2] The appellants argue that they deliberately paraphrased each material allegation of the bill to serve, among other things, the ends of *colloquium* and *innuendo*.

lacks power to enjoin a continuing or threatened libel, it is unnecessary to consider further the appellants' contention that they were denied their constitutional rights to due process and equal protection of the laws by the refusal of the chancellor to issue the *ex parte* injunction. And, since the lower court lacked jurisdiction to hear this case on the merits, the rulings of the chancellor on the demurrers will be affirmed.

JUDGMENT FOR COSTS AFFIRMED; THE APPELLANTS TO PAY THE COSTS OF APPEAL.

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## APPENDIX B

### Proceedings in the Court of Appeals of Maryland

#### MOTION TO AMEND ORDER AND MANDATE

Clement J. Prucha and Thomas H. Ward, Appellants, by Clayton A. Dietrich, their attorney, pursuant to Maryland Rules 855*a*, 871*a* and 872*a* moves that this Honorable Court amend its order and mandate in this appeal so as to remand this cause of action for transfer to a court of law for the filing of an appropriate declaration for the following reasons.

1. That this Honorable Court affirmed the Trial Court's judgment for costs which was entered upon a sustention of a demurrer (without leave to amend) based on lack of jurisdiction in equity to enjoin a libel.

2. That the false and malicious statements were published on February 23, 1962, and the statute of limitations (Section 1, Article 57, Code 1957) will run thereon this month (before the mandate will issue and before the Appellants have an opportunity to exercise their right to seek further review of the constitutional questions).

3. That the Appellants expressly reserved below their right under Maryland Rule 515 to have the substance of

the wrong considered in a law court by their motion of modification (E. 19).

4. That the Appellants upon remand should be entitled to amend their claim at law so as to develop the allegations of the accepted local significance of the false statements under the doctrine contained in *DeWitt v. Scarlett*, 113 Md. 47, 53, 56.

5. That in order to preserve the Appellants' procedural and substantive rights the order of affirmance should be modified to include a remanding of the case for transfer to a law court for the filing of an appropriate pleading on the merits.

CLAYTON A. DIETRICH,
Attorney for Appellants.

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ORDER

It is ORDERED by the Court of Appeals of Maryland this 12th day of March, 1964, that the within Motion to Amend Order and Mandate be and it is hereby denied.

F. W. BRUNE,
Chief Judge.

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## APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *Pertinent provisions of Fourteenth Amendment to United States Constitution:*

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Pertinent provisions of the Constitution of Maryland, Article IV:*

"Section 1. The Judicial power of this State shall be vested in a Court of Appeals, Circuit Courts, Orphans' Courts, such Courts for the city of Baltimore, as are hereinafter provided for. . . ."

"Sec. 18A. . . . The Court of Appeals from time to time shall make rules and regulations to regulate and revise the practice and procedure in that Court and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law."

"Sec. 29. The Circuit Court of Baltimore City shall have exclusive jurisdiction in Equity within the limits of said city, . . ."

"Sec. 39. . . . And the General Assembly may reapportion, change or enlarge the jurisdiction of the several Courts in said City."

3. *Pertinent provisions of Maryland Rules of Procedure:*

"Rule BB71. Application — Exceptions.

a. To Apply in Equity or at Law.

This Subtitle shall apply when an injunction is sought in equity or pursuant to Subtitle BF (Mandamus and Injunction as Ancillary Relief in an Action at Law), subject to sections b and c of this Rule."

"Rule BF40. Claim.

a. Generally.

In an action at law a party either in his original pleading or at any time after the commencement of the action (whether before or after judgment) may claim, in addition to any other demand which may be enforced in such action, that a writ of mandamus or injunction, or both, be issued."

"Rule BF43. Equitable Principles Applicable to Claim for Injunction.

In determining whether or not an injunction shall be granted pursuant to this Subtitle, the court shall apply the same tests and standards as would be applied in an action in equity."

"Rule 515. Transfer of Action from Law to Equity and Vice Versa General

a. Order of Transfer.

Where it shall appear that the plaintiff is or may be entitled to some relief or remedy, but not in the particular court, or on the side of the court in which the action is brought or the relief is prayed; the plaintiff shall not on that account be nonsuited or the action dismissed; but the action shall be transferred by an order to such proper court or docket, either of equity or law, in the same county, as the nature thereof may require, and upon such terms as to the payment of costs as the court may order."

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## APPENDIX D

QUESTIONS PRESENTED IN THE COURT OF APPEALS

"I. Were the Appellants, as candidates for public office, denied their constitutional rights to due process and equal protection of the laws by the State of Maryland through the act of its Circuit Court of Baltimore City in failing and refusing to grant a limited and temporary, injunctive restraint against the Appellees to prevent them from continuing and knowingly to publish untruthful statements concerning the Appellants with the intention of causing the Appellants' defeat at an imminent public election?

"II. Does a court of equity have the power to issue an injunction, to restrain the publishing of libellous statements?"